F. & D. No. 2848.
I. S. No. 13067-c.

Issued May 22, 1912.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1450.

(Given pursuant to section 4 of the Food and Drugs Act.)

ADULTERATION OF ICE CREAM.

On October 18, 1911, the grand jurors of the United States in and for the Third Judicial District, Territory of Arizona, on presentation by the United States Attorney for said district, acting upon a report from the Secretary of Agriculture, returned to the United States District Court for said district an indictment against Louis Rinchini, charging the manufacture and sale by him within said district in the Territory of Arizona of a quantity of ice cream which was adulterated.

Analysis of a sample of said product made by the Bureau of Chemistry of the United States Department of Agriculture showed that said ice cream was deficient in fat, containing only 7.09 per cent. The indictment charged adulteration for the reason that a valuable constituent of said product, to wit, milk fat, had been in part abstracted therefrom.

On October 19, 1911, the defendant, through his attorney, presented a demurrer to the indictment on the ground that it did not state facts sufficient to constitute a crime or an offense against the laws of the United States, and the same was overruled by the court; whereupon the defendant entered a plea of not guilty.

On October 21, 1911, the case coming on for trial before a jury and evidence having been submitted for and on behalf of the Government and the defendant, respectively, and argued by counsel, the case was submitted to the jury under the following instructions of the court, directing a verdict for defendant:

Gentlemen of the Jury, a motion has been made in this case to the Court to direct the jury to return a verdict for the defendant on the ground that the offense that the defendant is charged with has not been made out by the testimony. The defendant is charged with manufacturing an adulterated article of food, the claim being that a valuable constituent of the article has been in whole or in part abstracted. Now, of course, in the manufacture of ice cream, in the use of milk, as is done, together with some cream, the milk being an article from which the cream has been abstracted, the use of milk in the manufacture of ice cream is the use of an article from which a

valuable constituent has been in part abstracted. The question, therefore, to determine in this case is whether or not this defendant in making this ice cream which has been testified to be only 7.09% butter fat, is manufacturing an article from which a valuable constituent has been in part abstracted. Now, the Government, neither by the act of Congress nor by the rules of the Secretary of Agriculture, has established any standard with respect to ice cream: there is no standard established below which a product may not be deemed ice cream and sold as such, and above which it may. There is no fixed standard, as there is in some states, in this act of Congress or in any regulation or rule adopted by the Secretary of Agriculture. Therefore, the question now comes up whether or not the Court may, as a matter of law on the evidence now before me, say to you that a certain per cent is proper in the manufacture below which they may not manufacture, the contention of the Government being that the evidence here is such that the Court ought to fix on 14% as the amount of butter fat necessary in ice cream, and that any article manufactured below that is not ice cream, and if, manufactured as such, as the evidence is the defendant has done, he is within the province of the law. Now, I do not feel that the evidence of the custom or use of the trade, before me is such that I can fix upon, as a matter of law, any standard, as is requested by the Government. I am not confident that, under the law, the Court would have power to fix a standard in any event, but if the Court has power and should fix a standard for the jury then to say whether this falls above or below, I, nevertheless, do not think that the evidence in this case is sufficient to warrant my fixing upon any standard. The evidence is that the general custom of the merchants here of standing, like Mr. Donofrio and Mr. Sanichas, is that any cream below 14% is not proper cream to be called ice cream: there is evidence that in Chicago a large concern there who manufactures ice cream for the best trade, considers that anything below 12% is not ice cream, and is labeled "frozen milk," I believe. There is other testimony in the case that makes it impossible for the Court to fix a standard, for, if I fix a standard in this case, we may have some one up at the next term of Court indicted for selling ice cream with 12% butter fat if I fixed the standard at 14%, and under that standard the jury would be obliged to convict. I am not sure that 14% is the right amount. It should not be left, it seems to me, for the decision of the Court, but that it should be determined by Congress or by authorization of the Secretary of Agriculture so that the trade may know—so that any man manufacturing it will not be at the mercy of what his brother merchants in a town fix upon as being the right proportions. Therefore, in this case I do not think the evidence before me is sufficient for the standard to be fixed either by the Court or the jury below which this defendant may be said to have fallen. I grant the motion to direct a verdict for the defendant. One of you may sign it as foreman.

Whereupon the jury returned a verdict finding the defendant not guilty and the defendant was, thereupon, discharged from custody.

W. M. HAYS,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *April 11, 1912.*